

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SIDNEY R. WARD**

Claimant

VS.

**CIVIL AIR PATROL**

Respondent

AND

**OLD REPUBLIC INSURANCE CO.**

Insurance Carrier

Docket No. 270,484

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) requested review of the June 13, 2008, Award Upon Remand entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on September 3, 2008. Stephanie J. Wilson, of Lawrence, Kansas, appeared for claimant. Michael T. Halloran, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) determined that the medical evidence failed to demonstrate that claimant had a mental, memory or speech deficit as a result of the work-related accident. He also found that respondent failed to satisfy its burden in establishing that claimant had a preexisting shoulder condition. The ALJ gave equal credence to the opinions of Dr. Steven Hendler and Dr. Peter Bieri and concluded that claimant was entitled to a functional disability of 6.5 percent. The ALJ also concluded that claimant was entitled to a work disability. He found that claimant had a 100 percent wage loss and a 0 percent task loss, which computes to a work disability of 50 percent. The ALJ found that no additional evidence concerning temporary total disability benefits was entered and that he relied on the stipulation of the parties concerning the dates of payment and the compensation rate. Finally, the ALJ found that claimant is entitled to unauthorized medical up to the applicable statutory limit and is entitled to future medical care upon application for review and approval by the Director.

The Board has considered the record and adopted the stipulations listed in the Award Upon Remand. The record also contains and the Board also considered the transcripts of the preliminary hearing held November 5, 2001, the motion hearing held January 2, 2003, and the penalties hearing held March 25, 2002.

### ISSUES

Respondent argues that claimant is not entitled to a work disability and specifically is not entitled to a 100 percent wage loss. Further, respondent argues that claimant is not entitled to the full value of temporary total benefits paid because Dr. Jay Zwibelman concluded that claimant reached maximum medical improvement (MMI) on August 5, 2002<sup>1</sup>, and because claimant began a business on November 13, 2003. Respondent also contends that the ALJ erroneously awarded claimant both work disability and functional disability for the same injury.

Claimant argues that he is entitled to an award based on work disability and that his wage loss was 100 percent. He contends that although he engaged in work in a truck hauling business years after his accident, the business was not successful and he reported a loss on the business on his income tax returns. In the event the Board does not uphold the ALJ's award of work disability, claimant requests that the Board find Dr. Peter Bieri's rating opinion of 28 percent to the body as a whole to be the most credible. Claimant further argues that he was only paid temporary total disability benefits until he was released as being at MMI by his treating physician on August 18, 2005. Further, he asserts that the work he performed for Ward Hauling before that date did not amount to substantial and gainful employment.

The issues for the Board's review are:

(1) Is claimant entitled to an award based upon work disability? If so, is he entitled to a 100 percent wage loss?

(2) What is claimant's functional disability?

(3) Is claimant entitled to the full amount of temporary total disability benefits paid by respondent?

(4) Did the ALJ err in his calculation of the permanent partial disability award?

---

<sup>1</sup> Although respondent's brief sets out August 5, 2002, as the date Dr. Zwibelman found claimant to be at MMI, Dr. Zwibelman's August 5, 2002, report was based on an examination conducted on June 20, 2002.

FINDINGS OF FACT

Claimant is a CPA. He was employed by respondent as an auditor/accountant. On May 22, 2001, while in the course of his employment with respondent, he was involved in a rollover motor vehicle accident. He suffered a cut on the right side of his head and also injured his right shoulder and arm. He was seen in the emergency room, where his head was bandaged and he was released. A day or two later, he started having blurry vision, problems with his balance, and deteriorating speech. He said that there was pressure in his head that made him fall asleep. A CAT scan was done, and it was found that he had a grape-size blood clot in the lower part of his brain.

Claimant still has persistent headaches, although they have improved since the accident. He has pain in his right shoulder, problems with his speech, and balance problems. Since the accident, he finds it difficult to have a conversation without distracting hesitations and movements. He has trouble reading and comprehending. He has to take naps every day, sometimes twice a day. He tried to return to work on or about August 6, 2001, but was not able to handle it. He contends that he was temporarily totally disabled from August 15, 2001 through August 18, 2005.<sup>2</sup> He considers himself to be totally disabled now. At the regular hearing, claimant testified that he has not tried to work anywhere else since his accident. He also said that he has not looked for work since the accident. Claimant specifically denied starting a business.

Q. [by respondent's attorney] . . . Have you tried to create any businesses on the computer, do any work on the computer in business?

A. [by claimant] No.

Q. Have you created or set up any kind of businesses with you, your wife or anyone else?

A. No.<sup>3</sup>

However, at his July 16, 2007, deposition, taken after the May 9, 2007, regular hearing, claimant admitted that he had started a business known as Ward Hauling. He claims this was something he did for his grandson-in-law, who was an unemployed driver. Since claimant's grandson-in-law needed a job, claimant acquired the equipment. But his grandson-in-law was doing most of the driving. Claimant said he only tried driving a couple of times but he went the wrong way one time and became tired very quickly. He has ridden with his grandson-in-law and has driven alone for short distances. Claimant said he could

---

<sup>2</sup> At the preliminary hearing, claimant testified that he received temporary total disability checks beginning on or about May 31, 2001, when he was taken off work by Dr. Mark Thomas, until his release to return to work on or about August 6, 2001. (P.H. Trans. at 14-15.) Claimant testified that he was again taken off work by Dr. Thomas on August 14 or 15, 2001. At the regular hearing, the parties stipulated that temporary total disability was paid pursuant to the ALJ's November 8, 2001, preliminary hearing Order from August 15, 2001, through August 18, 2005. (R.H. Trans. at 4.)

<sup>3</sup> R.H. Trans. at 34-35.

not remember if he drove to New Mexico or Arizona. He claimed the business for Ward Hauling is unreliable and costs are high. Claimant said he has reported a loss on his income tax for the business, but those tax returns were not placed in evidence. Claimant acknowledged that he obtained a commercial driver's license (CDL) on August 25, 2006. He had to pass a DOT physical examination to get his CDL. He also said that he was about to lose his CDL because of his diabetes and heart condition. He said that he cannot drive because he is subject to diabetic blackouts. He acknowledged that these conditions were unrelated to his accident. Claimant said there was a significant time gap between when he obtained his insurance for the business and when he started hauling cars.

Sometime after his accident, respondent reorganized claimant's department. He was told that if he wanted to retain his position, he would have to reapply. But claimant said he forgot about it and failed to reapply. He was later told that if he had reapplied, he would have been retained because he was one of the most qualified people they had. Claimant also said he loved his job with respondent and would have stayed there if he felt he could have performed the job but could not because of his injuries and mental impairment.

Claimant acknowledged having prior right shoulder pain and a sleep disorder before this accident but said those were different from what he has now. Claimant also had a history of fibromyalgia, high blood pressure, heart disease, and transient ischemic attack (TIA).

Dr. Jay Zwibelman, a board certified neurologist, examined claimant on June 20, 2002, at the request of respondent. Claimant complained of intermittent headache and problems with dizziness. Claimant claimed he was unable to think or talk. Dr. Zwibelman reviewed a CT scan, which showed evidence of an 12 millimeter diameter right cerebellar hemorrhage located in the cerebellum underneath the occipital lobes. That part of the brain deals with coordination. No associated edema or mass effect was located on the CT scan. Dr. Zwibelman initially believed the intracranial hemorrhage was probably related to hypertension. The records initially showed the hemorrhage was caused by hypertension, but then physicians later thought it may have been caused by trauma. Dr. Zwibelman said there was no way to know with absolute certainty the exact cause of the hemorrhage, but the likelihood is that the motor vehicle accident caused the small hemorrhage in the cerebellum. Nevertheless, Dr. Zwibelman said that the cerebellum is an incredibly regenerative part of the brain and people recover pretty quickly from even a large stroke or surgical resection of part of it.<sup>4</sup> Most of the healing occurs during the first six months, but there can be improvement for up to two years.

An MRI report dated June 21, 2001, revealed diffuse scattered increased signal intensities consistent with microangiopathy. This is evidence of the tiny vessels having

---

<sup>4</sup> Zwibelman Depo. at 29.

some disease in them, but the disease would not have been caused by trauma. Typically, it is due to high blood pressure, diabetes and a bad lipid profile. Claimant has a lipid profile that puts him at risk for stroke and vascular disease. The medical records indicated that as of April 17, 2000, claimant had hypertension that was not adequately controlled.

Dr. Zwibelman said that during the examination, claimant stuttered at times. The consistency altered throughout the course of the examination. Sometimes he would speak quite fluently and a other times he had difficulty getting out a single word. This is usually not related to a specific problem in the brain. Dr. Zwibelman did not do formal psychometric testing but asked claimant about recent and remote events, and claimant did well with memory. He did not notice any drooping of the side of claimant's face and said the cerebellar hemorrhage noted on the CT scan of June 4, 2001, would not have caused any drooping of claimant's facial muscles. He noted that claimant's fine motor movements were slow. Again, this would not have been related to the hemorrhage because claimant's slow motor movements were bilateral. Claimant's gait was normal, and his base was normal. If claimant had a cerebellar problem, his base would be wider because that would be a way to compensate his balance. Claimant's walking was steady.

Dr. Zwibelman did not think the difficulties claimant had with his speech were related to the motor vehicle accident or the hemorrhage. Claimant had a tiny hemorrhage located in the hemisphere of the cerebellum. That location would not typically affect speech. He also did not believe claimant's cognitive changes were caused by the motor vehicle accident. He did not believe that claimant had post-concussion syndrome. Dr. Zwibelman found that claimant's mental status was normal and was well oriented to all spheres. His recent and remote memory was intact and his attention span and concentration were good. As of June 20, 2002, when he saw claimant, Dr. Zwibelman did not think claimant was temporarily totally disabled. And aside from possibly working with a psychiatrist, Dr. Zwibelman considered claimant to be at MMI with respect to the motor vehicle accident. In a supplemental report dated July 21, 2003, Dr. Zwibelman said that he did not believe the psychiatric conditions were from the motor vehicle accident.<sup>5</sup>

Dr. Steven Hendler, who is board certified in physical medicine and rehabilitation, examined claimant on July 21, 2005, at the request of respondent. He performed a physical examination. He found claimant's short-term memory to be zero over three per five minute delayed recall. Claimant had a right facial droop and deviation of the tongue to the right, and he had some word finding difficulty. He was unable to initiate heel or toe walking and could not perform tandem or unipedal activity. These were abnormal findings. Dr. Hendler found no abnormal findings with respect to claimant's extremities. He found no difference in his examination of claimant's right and left shoulders.

---

<sup>5</sup> Zwibelman Depo., Ex. 3.

Dr. Hendler diagnosed claimant with cerebellar hemorrhage, probably post-traumatic. He said claimant had cognitive deficits, balance deficits, depression, anxiety, and impingement syndrome on the right. He believes claimant's cerebellar hemorrhage was caused by the car accident, possibly combined with his poorly controlled hypertension. He did not think that claimant's balance issues were related to the accident or the hemorrhage because claimant had been noted to have had essentially normal balance function well past the onset of the hemorrhage. Dr. Hendler also believed that the aphasia findings were inconsistent with the other findings in such a way that he had trouble relating it to the accident. Claimant's hemorrhage was in the posterior aspect of the brain. Dr. Hendler said the main function in that area of the brain would be vision or visual perceptual systems. Therefore, the area of claimant's hemorrhage would be inconsistent with aphasia. Concerning claimant's memory problems, Dr. Hendler believed that claimant needed additional neuropsychological testing to sort out what was going on with his memory. Dr. Hendler thought there were inconsistencies in claimant's presentation regarding his memory and the degree of his memory deficits.

Dr. Hendler had the overall sense that claimant had reached MMI but believed that further testing should be undertaken before reaching that conclusion definitely. Claimant was sent to Dr. Terrie Price to administer tests. After reviewing the results of Dr. Price's tests, Dr. Hendler concluded that the testing was consistent with poor effort with unusual and exaggerated speech patterns at times and an invalid Minnesota Multiphasic Personality Inventory (MMPI). The results of the tests were consistent with Dr. Hendler's examination of claimant on July 21, 2005. Based upon his examination and the results of the tests, Dr. Hendler opined that claimant had reached MMI. Further, Dr. Hendler did not think that claimant needed any future treatment.

Using the *AMA Guides*,<sup>6</sup> Dr. Hendler rated claimant as having a 3 percent permanent partial impairment to the whole person for his balance deficit. Dr. Hendler believed that claimant's headaches and shoulder pain predated the accident and issued a 0 percent rating for those conditions. Regarding claimant's speech deficits, Dr. Hendler rated him as having a 3 percent permanent partial impairment to the whole body. Regarding claimant's mental status impairment, Dr. Hendler rated claimant at 5 percent to the whole body. Using the Combined Values Chart, Dr. Hendler found claimant had a total impairment rating of 11 percent to the whole person.

Dr. Hendler recommended that claimant should not be working at unprotected heights or with heavy machinery or on uneven surfaces. He recommended no other restrictions.

Dr. Terrie Price, a neuropsychologist, interviewed claimant on December 14, 2005, at the request of respondent. Claimant reported to her that he did not know he was

---

<sup>6</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

scheduled for an entire day, so the interview was completed on January 4, 2006. On January 23, 2006, claimant returned to complete the MMPI.

Dr. Price compared the results of her neuropsychological assessment with a previous assessment done with Dr. Wang. She noted that in August 2001, claimant yielded an IQ in the upper range of average, whereas in January 2006, his IQ was average or slightly below average, which was a significant change. She also observed that there were some differences in memory testing. She stated that claimant performed lower than expected on the Memory Malinger and Word Memory Test. The results of the MMPI suggested an invalid profile, meaning it did not yield clinically significant information.

Dr. Price opined that the problems noted in her report are not consistent with either post-concussion syndrome or a right cerebellar hemisphere hemorrhage. Dr. Price noted that claimant had an inconsistent speech pattern. At times he evidenced substantial difficulty saying letters and at other times there was no observed speech problem. On a speech fluency test, claimant's performance was within functional limits, meaning on that test, under pressure, he did not evidence areas of difficulty. Claimant also did not exhibit anomia or difficulty with naming. On oral vocabulary, claimant tested in the upper level of average. Dr. Price's diagnosis is that claimant has a somatoform disorder. Dr. Price suspected malingering.

Dr. Price said that claimant described his sleep habits as erratic. He said he could not sleep eight hours continually and that this has been present since the accident. At one point during a break, Dr. Price found claimant in a chair with his eyes closed apparently sleeping. Dr. Price also found that claimant struggled with dates. Claimant performed well below average on the sustained attention test. The validity questions on the test did not allow her to identify the presence of a change, and the profile clearly suggested symptom magnification. When tested, claimant's motor functions were substantially delayed, yet claimant did not report significant problems with motor functions and said he was able to independently take care of himself. The data from the test would suggest greater functional impact than reported by claimant. The same was true of claimant's performance on the attention testing. As for his functional implications, Dr. Price concluded that claimant's true cognitive status is uncertain given the questionable validity of the testing. "The issues of poor effort and possible secondary gain suggest that Mr. Ward is not a good candidate for further treatment at this time."<sup>7</sup>

Dr. Peter Bieri, who is board certified in disability evaluations, examined claimant on October 20, 2006, at the request of claimant's attorney. Claimant told him he had been involved in a rollover accident and sustained a head injury with possible brief loss of consciousness. He subsequently developed symptoms of an intercranial hemorrhage, and

---

<sup>7</sup> Price Depo., Ex. 2 at 23.

studies were consistent with a right cerebellar hemorrhage. Surgery was not recommended, and claimant was treated conservatively.

Claimant told Dr. Bieri that he developed post-traumatic headache problems, as well as cognitive and speech disorders. He has had speech therapy. Testing performed on claimant revealed varying levels of impairment in speech, attention and concentration, memory, and learning problems. Claimant told Dr. Bieri that he has also been diagnosed with anxiety disorder and panic attacks. He described intermittent dizziness primarily associated with head movements. He also complained that his right shoulder continued to be painful, primarily with shoulder level and overhead use.

Claimant denied preexisting conditions. He may have sustained a cervical spine injury in 1978 but had no apparent residual impairment from that injury. At the time of the examination, claimant was unemployed and told Dr. Bieri that he has been unable to work since the injury.

Upon examination, claimant presented with a flat affect and had noticeable speech difficulty. Claimant's speech pattern was one of alternate stuttering with pauses for attempts at enunciation and articulation. He showed mild to moderate difficulty with intelligibility and functional efficiency. His thought processes were interrupted frequently with difficulty in short and long term memory lapses. Claimant had some drooping about the angle of the mouth on the left side, which was consistent with the site of his intracranial hemorrhage. He complained of subjective vertigo with no nausea or vomiting. Positional testing of the head and neck confirmed repeatable nystagmus, which is rapid eye movement stimulated by a change in position. This also is consistent with claimant's head injury. Neurologic examination revealed a slight inability to perform repetitive fine and gross motor movements with the upper extremities. Claimant demonstrated no persistent gross cerebellar defects. Examination of claimant's right shoulder showed slight tenderness to palpation at the right AC joint, with crepitation on active and passive range of motion.

Based on the *AMA Guides*, Dr. Bieri rated claimant as having a 14 percent permanent partial impairment to the body for disturbance of mental status and integrative functioning; 10 percent permanent partial impairment to the body for vestibular dysfunction; 15 percent permanent partial impairment for claimant's speech impairment, which translates to 5 percent whole person impairment; and 3 percent permanent partial impairment to claimant's right upper extremity, which translates to a 2 percent whole person impairment. Using the Combined Values Chart, Dr. Bieri rated claimant total whole person impairment attributable to the accident to be 28 percent.

Dr. Bieri recommended that claimant limit shoulder-level and overhead use on the right to no more than frequently. Claimant should not balance or climb. Dr. Bieri also opined that claimant would have moderate difficulty in any job that required integrative functioning and marked difficulty in any job that required continuous, detailed verbal communication.



It is Dr. Bieri's opinion that claimant's hemorrhage was related to his accident. He diagnosed claimant as having a traumatic injury based on the history provided by claimant. However, Dr. Bieri said that claimant's speech disorder is not controlled by the right cerebellum, and his speech patterns do not seem to have any relationship to the right cerebellar hemorrhage.

Dr. James Eyman, a licensed psychologist, met with claimant on July 16 and September 21, 27, and 28, 2007, at the request of the ALJ for an independent psychological evaluation, disability rating, and recommendation for further psychological treatment. After review of claimant's medical and psychological records and performing tests, Dr. Eyman opined that claimant is not experiencing memory or speech problems, nor is he depressed or anxious. Dr. Eyman indicated that claimant's memory complaints are in excess of what would be expected given the injury to his cerebellum. He did not believe that claimant was intentionally exaggerating his cognitive and psychological condition, but he also could not rule out malingering. Dr. Eyman did not evaluate claimant's balance problem. He did not find that claimant had a disability to rate.

Stuart Ford is an investigator employed by Blue Eagle Investigations. He was one of the investigators hired by respondent to perform surveillance on claimant. On July 21 and 22, 2005, Mr. Ford observed that claimant had a truck and trailer outside his residence. He did not see claimant conducting any activity with the trailer. On later occasions, however, Mr. Ford did see the trailer being used to haul cars across the United States. On July 22, 2005, Mr. Ford followed claimant into a physician's office, where he overheard claimant commenting that he traveled with his job and that he was an Internet car hauler. On August 15, 2005, he observed claimant hauling some vehicles. He saw claimant moving the vehicles off and on the truck. Then claimant drove to Kansas City, Kansas, to a salvage auction location. When claimant arrived at the salvage auction, Mr. Ford observed claimant off-load an automobile and load another vehicle. He did not notice any physical hesitation, and claimant did not appear to have any difficulties tying down the vehicles or performing any tasks. Claimant then drove to Columbia, Missouri. On the way, claimant stopped and appeared to take a nap. Mr. Ford did not follow claimant all the way to Columbia but confirmed he had dropped off a vehicle there.

On August 16, 2005, claimant was observed loading and unloading vehicles at his residence. He then drove his truck with loaded vehicles to Wichita, Kansas. He went to a Volvo dealership, switched out some vehicles, and continued to Oklahoma City. In doing so, claimant was seen moving the ramps on the trailer and using tie-down straps on the vehicles without difficulty. In February 2006, claimant's truck was observed with a sign on the side showing "Ward Hauling." According to the investigative report, claimant appeared to be continuing his duties as a car hauler. On March 29 and 30, 2006, claimant was again observed in the process of transporting vehicles in Texas. At that time, claimant was driving with another man.

Mr. Ford obtained a printout from the United States Department of Transportation that showed that the business known as Ward Hauling was located at 205 Locust, Apartment 4, Centralia, Kansas, and that claimant first obtained insurance on his truck on November 14, 2003.

Based upon the investigations of Blue Eagle Investigations, Mr. Ford concluded that claimant was operating a car-hauling business and that he did not appear to have any difficulty doing that job. He observed claimant take naps on three occasions, and on two occasions he did not take a direct route to his destination.

#### **PRINCIPLES OF LAW**

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510c states in part:

Where death does not result from the injury, compensation shall be paid as provided in K.S.A. 44-510h and 44-510i and amendments thereto and as follows:

(a) . . . .

(2) Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) . . . .

(2) Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

(3) Where no award has been entered, a return by the employee to any type of substantial and gainful employment or, subject to the provisions of subsection (b)(2), a release by a treating health care provider or examining health care provider, who is not regularly employed or retained by the employer, to return to any type of substantial and gainful employment, shall suspend the employee's right to the payment of temporary total disability compensation, but shall not affect any right the employee may have to compensation for partial disability in accordance with K.S.A. 44-510d and 44-510e and amendments thereto.

K.S.A. 44-510d(a) states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

....  
(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

....  
(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

K.S.A. 44-510e(a) states in part:

(a) If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be  $66 \frac{2}{3}\%$  of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 44-510f(a) states:

(a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

(1) For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, \$125,000 for an injury or any aggravation thereof;

(2) for temporary total disability, including any prior permanent total, permanent partial or temporary partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof;

(3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof; and

(4) for permanent partial disability, where functional impairment only is awarded, \$50,000 for an injury or aggravation thereof.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.<sup>8</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>9</sup> An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.<sup>10</sup>

### ANALYSIS

Claimant was not truthful at the regular hearing about the business he started. When he was confronted at his subsequent deposition about Ward Hauling, claimant admitted starting that business but indicated his involvement was minimal. The surveillance digital recordings contradict claimant's subsequent deposition testimony about how involved he was with that business. Also, the digital recordings showing claimant walking and performing work tasks without apparent difficulty contradict claimant's testimony about his problems performing such activities. Claimant lacks credibility. As such, his testimony about the nature and extent of his injuries and his post-accident ability to engage in substantial gainful employment is afforded little weight.

It is more probable than not that claimant's cerebellar hemorrhage resulted from the automobile accident of May 22, 2001. It is also probable that claimant aggravated a preexisting right shoulder condition in that accident. But based upon the greater weight of the credible evidence, those injuries were temporary. The automobile accident did not result in permanent impairment to either claimant's shoulder or his brain function. The Board finds that claimant's current symptoms and complaints are the result of other conditions and are unrelated to his accident.

Based upon the testimony of Dr. Zwibelman, the Board finds that claimant's brain hemorrhage resolved and the cerebellum regenerated. Claimant has no permanent impairment from the trauma to his head. Any problems claimant now has with the blood vessels in his head are due to hypertension, diabetes, a bad lipid profile, or other personal

---

<sup>8</sup> *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

<sup>9</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

<sup>10</sup> *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

conditions unrelated to the accident. Dr. Eyman likewise found no rateable disability or impairment. Furthermore, Dr. Price determined that claimant's problems were not consistent with either post-concussion syndrome or a right cerebellar hemisphere hemorrhage.

As for claimant's right shoulder injury, when claimant was examined by Dr. Hendler in June 2005, he found no difference between claimant's right and left shoulders. He opined that claimant's right shoulder condition was the same as it had been before the accident. The Board finds that claimant suffered no permanent impairment to his right shoulder as a result of the accident.

The Board further finds that claimant was at MMI and was not temporarily totally disabled as of the date of Dr. Zwibelman's examination on June 20, 2002.

### **CONCLUSION**

Claimant suffered only temporary injuries. He has no permanent impairment of function from the May 22, 2001 accident. He has no permanent partial disability, no permanent work restrictions, and no work disability. Claimant is entitled to temporary total disability compensation for the periods of May 31, 2001, when he was taken off work by Dr. Thomas, until August 6, 2001, when he returned to work, and from August 15, 2001, when he was again taken off work by Dr. Thomas, until June 20, 2002, when he was found to be at MMI by Dr. Zwibelman.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated January 24, 2008, is modified to find that claimant had no permanent impairment of function from the May 22, 2001, accident and that he is entitled to temporary total disability compensation from May 31, 2001, to August 6, 2001, and from August 15, 2001, to June 20, 2002. Claimant is not entitled to any award of permanent partial disability compensation.

For the dates from May 31, 2001, to August 6, 2001, claimant is entitled to 9.57 weeks of temporary total disability compensation at the rate of \$401 per week or \$3,837.57, and for the dates from August 15, 2001, to June 20, 2002, claimant is entitled to 44.14 weeks of temporary total disability compensation at the rate of \$401 per week or \$17,700.14, for a total award of \$21,537.71, less amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October, 2008.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c:     Stephanie J. Wilson, Attorney for Claimant  
       Michael T. Halloran, Attorney for Respondent and its Insurance Carrier  
       Brad E. Avery, Administrative Law Judge